Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: Contract Dispute of Morpho Detection, Inc.

Under Contracts DTFA01-02-C-00023 and DTSA20-03-C-01900

Docket No.: 08-TSA-039

Appearances:

For the Contractor:	David A. Churchill, Esq.; Carrie Apfel, Esq., Jenner & Block LLP
For the Transportation Security Administration:	Ross Dembling, Esq.; Angela Varner, Esq.

The State of Washington has assessed against Morpho Detection, Inc. ("MDI")[1] over $5.2 million for use taxes and business & occupation ("B&O") taxes, along with interest and penalties, relating to work for installing, integrating, testing, etc. of 46 explosive detection devices ("EDS") under two contracts ("Contracts") with the Transportation Security Administration ("TSA"). MDI seeks recovery from TSA for this assessment under the theory that Acquisition Management System ("AMS") Clause 3.4.2-7 "Federal, State, and Local Taxes--Fixed-Price, Noncompetitive Contract (April 1996)," should be in the Contracts, and that the

[1] As described in Finding of Fact ("FF") 28, the original contractor to both contracts was InVision Technologies, Inc. The contractor's business identity changed through a series of transactions to become GE Homeland Security, Inc., and subsequently changed again to become MDI. For simplicity, "MDI" will be used throughout this decision to refer to MDI and its predecessors in interest regardless of the formal corporate name at the time in question. This continues the practice established by MDI itself and adopted by the ODRA. *Decision on Request for Partial Summary Decision* (September 16, 2011) at 1 n.1.

assessment is an "after-imposed" tax that justifies an increase in the contract price. For the reasons stated below, the ODRA recommends that the Contract Dispute as amended be denied.

I. Burden and Standard of Proof

"In contract disputes, the burden of proof generally lies with the claimant, who must prove the case by a preponderance of the evidence, and must demonstrate liability, causation, and injury." *Contract Dispute of Carmon Construction, Inc./GAVTEC, Inc.*, 07-ODRA-00425 (citing *Contract Dispute of Strand Hunt, 99-ODRA-00142); see also E. Avico, Inc.,* 00-ODRA-00149). Applying this standard to the present contract dispute, MDI must demonstrate that the TSA is liable under the Contracts for the assessments imposed by the State of Washington, and that TSA's action or inaction has caused amounts owed for tax payments by MDI not to be paid.

II. Findings of Fact

A. The Clause

1. During the time periods relevant to the formation of the contracts,[2] the AMS included the following clause and prescription.

> **3.4.2-7 Federal, State, and Local Taxes--Fixed-Price, Noncompetitive Contract (April 1996)**
>
> (a) Definitions:
>
> (1) "Contract date," as used in this clause, means the effective date of this contract and, for any modification to this contract, the effective date of the modification.
>
> (2) "All applicable Federal, State, and local taxes and duties," as used in this clause, means all taxes and duties, in effect on the contract date, that the

[2] This Finding of Fact cites the April 1996 version of the clause rather than the February 2003 version found in Morpho Detection Inc.'s Supplemental Dispute File Exhibit ("MDI Ex.") Q. There are no material differences between the two versions. The current FAA AMS contains the April 1996 version, and the record is not clear as to the source of the February 2003 version. *But see infra* FF 41 and 42. The ODRA notes that the earlier version was in effect during the negotiation period relating to the letter contract DTFA01-02-C-00023, which was executed in February 2002. *See Amended Dispute File ("ADF") Tab 17; MDI* Ex. A, *Rosen Decl*. ¶¶ 4 and 5.

taxing authority is imposing and collecting on the transactions or property covered by this contract.

(3) "After-imposed tax," as used in this clause, means any new or increased Federal, State, or local tax or duty, or tax that was excluded on the contract date but whose exclusion was later revoked or amount of exemption reduced during the contract period, other than an excepted tax, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.

(4) "After-relieved tax," as used in this clause, means any amount of Federal, State, or local tax or duty, other than an excepted tax, that would otherwise have been payable on the transactions or property covered by this contract, but which the Contractor is not required to pay or bear, or for which the Contractor obtains a refund or drawback, as the result of legislative, judicial, or administrative action taking effect after the contract date.

(5) "Excepted tax," as used in this clause, means social security or other employment taxes, net income and franchise taxes, excess profits taxes, capital stock taxes, transportation taxes, unemployment compensation taxes, and property taxes. "Excepted tax" does not include gross income taxes levied on or measured by sales or receipts from sales, property taxes assessed on completed supplies covered by this contract, or any tax assessed on the Contractor's possession of, interest in, or use of property, title to which is in the Government.

(b) Unless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

(c) The contract price shall be increased by the amount of any after-imposed tax, or of any tax or duty specifically excluded from the contract price by a term or condition of this contract that the Contractor is required to pay or bear, including any interest or penalty, if the Contractor states in writing that the contract price does not include any contingency for such tax and if liability for such tax, interest, or penalty was not incurred through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(d) The contract price shall be decreased by the amount of any after-relieved tax. The Government shall be entitled to interest received by the Contractor incident to a refund of taxes to the extent that such interest was carried after the Contractor was paid by the Government for such taxes. The Government shall be entitled to repayment of any penalty refunded to the Contractor to the extent that the penalty was paid by the Government.

(e) The contract price shall be decreased by the amount of any Federal, State,

or local tax, other than an excepted tax, that was included in the contract price and that the Contractor is required to pay or bear, or does not obtain a refund of, through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(f) No adjustment shall be made in the contract price under this clause unless the amount of the adjustment exceeds $250.

(g) The Contractor shall promptly notify the Contracting Officer of all matters relating to Federal, State, and local taxes and duties that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs. The contract price shall be equitably adjusted to cover the costs of action taken by the Contractor at the direction of the Contracting Officer, including any interest, penalty, and reasonable attorneys' fees.

(h) The Government shall furnish evidence appropriate to establish exemption from any Federal, State, or local tax when:

(1) the Contractor requests such exemption and states in writing that it applies to a tax excluded from the contract price and

(2) a reasonable basis exists to sustain the exemption.

(End of clause)

PRESCRIPTION

Shall be used in RFIs/RFPs and contracts when a fixed-price noncompetitive contracts [sic] is to be performed wholly or partly within the United States[,] its possessions[,] or Puerto Rico and *when satisfied that the contract does not contain contingencies for state and local taxes*.

AMS Clause 3.4.2-7, "Federal, State, and Local Taxes--Fixed-Price, Noncompetitive Contract (April 1996)" (emphasis in prescription added).

B. Contract DTFA01-02-C-00023

2. On November 23, 2001, the Federal Aviation Administration ("FAA") issued Solicitation Number DTFA01-02-R-00808, seeking proposals for a "firm fixed price contract with indefinite delivery/indefinite quantity (IDIQ) and time and material (T&M) Contract Line

Item Numbers (CLINs)." *ADF* Tab 1, § B.1; *MDI* Ex. M, §B.1.[3] Section B.1 also explained that "Delivery/Task orders will be issued for all equipment and service orders." *Id.*

3. Solicitation Number DTFA01-02-R-00808 did not contain the tax clause at issue in this Contract Dispute. *ADF* Tab 1, § I.

4. On January 11, 2002, MDI submitted a revised cost proposal in response to Solicitation Number DTFA01-02-R-00808. *MDI* Ex. N. The cost proposal expressly states that it "does not include any exceptions and deviation from the cost proposal instructions provided in Section L." *Id.* at Vol. V, page 1. It also stated, "This proposal includes only product manufacturing, time and materials work, and optionally after-warranty service." *Id.* at 2. The cost proposal does not affirmatively state in writing that the prices do not include any contingency for local, state or federal taxes. *Id*. at 1-16.

5. On February 19, 2002, the FAA entered into a letter contract ("Letter Contract") with MDI. *ADF* Tab 17; *see also MDI* Ex. A, *Rosen Decl.* ¶ 5.

6. Bilateral modification 0002, signed on September 6, 2003, indicates that the Letter Contract was definitized as TSA Contract DTFA01-02-C-00023 ("Contract 00023"), and states that it "represents the agreement of the parties concerning the definitization from the letter contract to a fully integrated document." *ADF* Tab 19 at 1. The definitized Contract 00023 did not contain the tax clause at issue in this Contract Dispute. *Id. at* § I.

7. As definitized, the TSA used CLINs 0001A, 0006A, and 0007 of Contract 00023 to purchase Explosive Detection Systems ("EDS") to be used in baggage handling facilities at airports. *ADF* Tab 19, § B.4.1. The EDS units became Government property at

[3] Several documents found in the TSA's Amended Dispute File duplicate documents found in MDI's Supplemental Dispute File. Unless otherwise indicated, these Findings and Recommendations will cite to any duplicated documents by its location in the Amended Dispute File, rather than providing both citations.

MDI's manufacturing plant in Newark, California. *Joint Stipulations of Undisputed Facts "JSOUF")* Nos. 10, 29, and 35; *ADF* Tab 19, §§ E.3.1 and F.2. Several other CLINs provided the TSA with goods such as simulators (CLIN 00005), parts (CLIN 00A6A), and Quality Assurance Surveillance Plan ("QASP") items (CLIN 0008). *Id*. Each of these CLINs used firm-fixed-pricing, with unit prices, maximum and minimum quantities, along with simple extended prices. *Id*. The specifications for the equipment are not material to the present Contract Dispute.

8. CLIN 3000 of Contract 00023 was a T&M CLIN that "will be used in the event that engineering support or installation services are ordered pursuant to Statement of Work,"[4] and the statement of worked stated:

> 3.14. Engineering Support Services (CLIN 3000)
> The Contractor shall provide the services of senior engineers and technicians to perform support tasks including, but not limited to, witnessing and assisting in operational and field tests, troubleshooting and correction of problems that may arise after successful completion of test, assisting the government in installing of a network integrated EDS, equipment installation including performance of site surveys, site design and project coordination.

ADF Tab 19, § C.3.14. The Statement of Work also required under CLIN 3000 that EDS units to be installed "when directed by the [contracting officer] by individual [task] orders." *Id.* at § C.3.9.2. Such an order could require that "[t]he Contractor shall integrate and install the EDS." *Id.* at § C.3.9.2.3. CLIN 3000 provided 16 labor categories, travel, materials, and "other direct costs." *ADF* Tab 19, § B.4.4.

9. Clause G.10 required MDI to use task order accounting, stating specifically:

> G.10 Accountability of Costs/Segregation of Task Orders
> All costs incurred, in performance of Task Orders issued under this contract, shall be accumulated in a separate job order cost account established specifically for that task order number. There shall be no commingling of cost between Task Orders.

ADF Tab 19, § G.10.

[4] *ADF* Tab 19, § B.4.4.

10. As demonstrated by special clause H.1, the TSA planned to have a "General Contractor and/or System Integration Contractor" ("General Contractor") at locations where the EDS units would be installed. Clause H.1 defined the level of cooperation expected from MDI and the General Contractor. *ADF* Tab 19, § H.1; *see also JSOUF* No. 18.

11. Section H.2 provided the procedure for issuing a task order under CLIN 3000, and it provided MDI an opportunity to estimate the costs for each individual task order. Specifically, the clause provided:

> c. Procedures. The Contracting Officer will submit to the Contractor a Task Order marked "Draft" for the Contractor to review and comment. The Contractor will consult with the COTR to estimate resources (time, material, travel and GFP/GFI support) needed to accomplish the Task Order requirements. The Contractor will prepare an estimate and forward it to the Contracting Officer by facsimile transmission or other rapid communication method. . . .

ADF Tab 19, § H.2.

12. On April 27, 2004, the TSA executed bilateral modification "4" to "add a Contract Line Item Number 0009 for delivery of Installation and Rigging services." *ADF* Tab 20 at 1. This modification did not add funds to Contract 00023, state any quantities, or state pricing for the new CLIN 0009. *Id.* The Statement of Work also was modified to add:

> Section 3.15 9 [sic] (CLIN 0009) – The Contractor shall provide rigging and installation services to support installation of EDS units and related equipment.

Id. at 2.

13. The definitized contract "is a firm fixed price contract with indefinite delivery/indefinite quantity (IDIQ) and time and material (T&M) Contract Line Item Numbers (CLINS)." *ADF* Tab 19, § B.2. Consistent with this description, Contract 00023 contains clauses that address both firm-fixed-pricing and T&M pricing, and by way of example, these include multiple changes clauses, inspection clauses, subcontracts clauses, termination clauses, etc. *ADF* Tab 19, § I.1.

C. Contract DTSA20-03-C-01900

14. The TSA signed Contract DTSA20-03-C-01900 ("Contract 01900") with MDI on August 5, 2003. *ADF* Tab 22. Contract 01900 was an IDIQ contract with firm-fixed-price CLINs, as well as T&M CLINs. *ADF* Tab 22, §§ B.2 and B.4. Consistent the CLIN structure, Contract 01900 contains clauses that address both firm-fixed pricing and T&M pricing, and by way of example, these include multiple changes clauses, inspection clauses, subcontracts clauses, termination clauses, etc. *ADF* Tab 22, § I.1.

15. In general terms, the TSA used CLINs 0001, 0002, and 0003 of Contract 01900 to purchase Explosive Detection Systems ("EDS") to be used in baggage handling facilities at airports. *ADF* Tab 22, § C.3.0. CLIN 0004 provided for "technical interchange meetings." *Id.* Other CLINs provided for related baggage handling equipment and electronics. *Id.* at CLINs 0005A-I, 0006A-E, and CLIN 0007A-E. Each of these CLINs used firm-fixed-pricing, with unit prices, maximum and minimum quantities, along with simple extended prices. *Id.* The specifications for the equipment and meetings are not material to the present Contract Dispute.

16. Section B of Contract 01900 stated, "CLIN 3000 will be used in the event that engineering support or installation services are ordered pursuant to Statement of Work [.]" *ADF* Tab 22, § B.4.4. CLIN 3000 included 16 separate labor categories with associated hourly rates, along with estimates for cost reimbursement items relating to travel, materials, shipping, and "other direct costs." *Id.*

17. Work under CLINs 0001 to 0003 obligated the Contractor to properly package the equipment for shipment and deliver it to the Government Freight on Board ("F.O.B.") in Newark, CA. *JSOUF* Nos. 18 and 29; *ADF* Tab 22, §§ E.3.1 and F.2. The equipment became Government property at MDI's manufacturing plant in Newark, California. *JSOUF* No. 10, 29, and 35. MDI, however, was to "install and integrate" the equipment only "when directed by the [contracting officer] by individual delivery orders." *ADF* Tab

22, §§ C.3.9.1 and C.3.9.2. Installation services were billed to CLIN 3000. *Id.* at § C.3.14.

18. As demonstrated by special clause H.1, the TSA planned to have a "General Contractor and/or System Integration Contractor" ("General Contractor") at locations where the EDS units would be installed. Clause H.1 defined the level of cooperation expected from MDI and the General Contractor. *ADF* Tab 22, § H.1; *see also* JSOUF No. 18.

19. Special clause H.2 defined the process of issuing orders that used installation services under CLIN 3000. *ADF* Tab 22, § H.2. Just like Contract 00023, Contract 01900 provided MDI an opportunity to estimate the costs for each individual task order. Specifically, the clause provided:

> c. Procedures. The Contracting Officer will submit to the Contractor a Task Order marked "Draft" for the Contractor to review and comment. The Contractor will consult with the COTR to estimate resources (time, material, travel and GFP/GFI support) needed to accomplish the Task Order requirements. The Contractor will prepare an estimate and forward it to the Contracting Officer by facsimile transmission or other rapid communication method. . . .

ADF Tab 22, § H.2.

20. Clause G.10 required MDI to use task order accounting, stating specifically:

> G.10 Accountability of Costs/Segregation of Task Orders
> All costs incurred, in performance of Task Orders issued under this contract, shall be accumulated in a separate job order cost account established specifically for that task order number. There shall be no commingling of cost between Task Orders.

ADF Tab 22, § G.10.

21. On April 27, 2004, the TSA executed bilateral modification "3" to "add a Contract Line Item Number 0009 for delivery of Installation and Rigging services." *ADF* Tab 25. This modification did not add funds to Contract 00023, state any quantities, or state pricing for the new CLIN 0009. *Id.* The Statement of Work was also modified to add:

> Section 3.15 (CLIN 0009) – The Contractor shall provide rigging and installation services to support installation of EDS units and related equipment.

Id. at 2.

22. Many standard AMS clauses were incorporated by reference into the Contract, but Section I does not contain the tax clause at issue in this Contract Dispute. *ADF* Tab 22, § I.

D. Installation Work Performed in the State of Washington

23. The State of Washington Department of Revenue's initial tax assessment, and the subsequent administrative adjudications, considered MDI's tax liability for the audit period of January 1, 2002 to March 31, 2006. *MDI* Exhibits I, R, and CC. These findings of fact, accordingly, focus on the audit period in question.

24. As shown in the following table, one delivery order under Contract 00023, and seven delivery orders under Contract 01900, required MDI to perform "installation" of EDS units in the State of Washington during the audit period. Seven other delivery orders under Contract 01900 related to "integration" or "multiplexing" of EDS units. Specifically, the record provided shows:

Table 1: Orders within Audit Period for Site Services in the State of Washington

Delivery Order ("D.O.")	Cites CLIN 0009 (Yes / No)	CLIN 3000 Estimated Total	Final Amended Delivery Order Ceiling	Observations Regarding Delivery Order Requirements
Contract 00023				
D.O. 5 (MDI Ex. X, Tab 5)	Y	$1,203,714	$52.358M	Site services under CLIN 3000, and rigging specifically stated for Seattle in amendment 5. ($51M of this order was for 91 EDS units and other equipment.)
Contract 01900				
D.O. 1 (MDI Ex. Y, Tab 1)	Y	$162,392	$54.8M	Site services under CLIN 3000, and rigging specifically stated for Seattle. ($54M of this order was for 45 EDS units and other equipment.)

D.O. 3 (MDI Ex. Y, Tab 3)	Y	$529,052	$1,000,000	Site services under CLIN 3000, and rigging specifically stated for Seattle and Spokane. The D.O. cites to InVision proposal SQ413 for Seattle work, and SQ454 for Spokane work.
D.O. 18 (MDI Ex. Y, Tab 18)	Y	$189,376	$500,000	Site services under CLIN 3000, and rigging specifically stated for Seattle and Spokane. The D.O. cites In-Vision proposal SQ497 for work at Seattle, and SQ512 for work at Spokane.
D.O. 35 (MDI Ex. Y, Tab 35)	N	$49,576	$49,576	The D.O. is for "professional services associated with the installation of 3 CTX 9000 for Spokane International Airport (GEG) . . . ."
D.O. 50 MDI Ex. Y, Tab 50)	Y	N/A	$195,976	Installation and rigging services for nine EDS units Seattle-Tacoma International Airport.
D.O. 60 (MDI Ex. Y, Tab 60)	Y	N/A	$50,744	Installation and rigging services for two EDS units Seattle-Tacoma International Airport. D.O. cites to InVision proposal SQ650.
D.O. 84 (MDI Ex. Y, Tab 84)	Y	$364,951	$721,600	Installation, rigging and project management in Seattle for four CTX 9000 EDS units.
D.O. 29 (MDI Ex. Y, Tab 29)	N	$17,500	$414,500	"Multiplexing" of three CTX 9000 EDS units in Seattle.
D.O. 57 (MDI Ex. Y, Tab 57)	N	$111,433	$111,433	"Integration" of seven CTX 9000 DSi units in Seattle, priced based on InVision quote SQ623R1.
D.O. 61 (MDI Ex. Y, Tab 61)	N	$68,264	$68,264	"Integration" of three CTX 9000 DSi units in Seattle, priced based on InVision quote SQ623R1.
D.O. 66 (MDI Ex. Y, Tab 66)	N	$179,081	$179,081	"Integration Site Acceptance Testing" ("ISAT") of seven CTX 9000 in Seattle, priced based on InVision quote SQ624.
D.O. 67 (MDI Ex. Y, Tab 67)	N	$70,957	$70,957	"Integration" and ISAT of two CTX 9000 DSi units in Seattle, priced based on InVision quotes SQ651 and SQ652.
D.O. 70 (MDI Ex. Y, Tab 70)	N	$80,764	$80,764	ISAT of three CTX 9000 units in Seattle, priced based on InVision quote SQ625.
D.O. 75 (MDI Ex. Y, Tab 75)	N	$85,000	$195,000	Adding two CTX 9000 units into the "multiplexing network" in Seattle. Cites InVision quote SQ662.
Total for CLIN 3000		$3,112,060		

NOTE: The parties included in the record other delivery orders under Contract 01900 that are not clearly related to the installation (as opposed to purchase) of EDS machines in Seattle or Spokane. *See MDX* Ex.

Y, Tabs 2, 4, 5, 6, 26, and 27. They also included several delivery orders that contain performance periods completely outside the audit period. *See MDX* Ex. Y, Tabs 96, 104, and 113; *ADF* Tabs 77, 85, and 86.

25. The preponderance of the evidence shows that MDI performed its installation, rigging, integration, and other efforts under CLINs 0009 and 3000 after being afforded the opportunity to provide site-specific proposals for the work. Notably, as the fifth column of Table 1, *supra*, shows, most of the delivery orders themselves cite to a quotation from MDI's predecessor (InVision) and specifically reference a location for performance. FF 24. Specific examples of this proposal process are found in the record, including a letter of accepting quote SQ454, which was cited in Delivery Order 3 under Contract 01900. *MDI* Ex. Y, Tab 3, at 10 (modification 2 to Delivery Order 3); *ADF* Tab 104 (TSA letter of acceptance). Another example dates from July 16, 2003, when MDI provided TSA with SQ309, which is "an estimate for the placement of two each CTX 9000s at Seattle Airport." *MDI Ex*. G, at 1. That quotation provides two separately priced alternatives, as well as the following statement:

> All work to be performed is in normal working hours. The structural review for the attachment to the buildings steel is by Others [sic]. Washington State gross sales tax of 8.8% has not been included in the above pricing if it is applicable. Access to the platform areas will need to remain open for the installation. It is our understanding that badging is not required for this area.

Id. at 2. As the quote itself shows, MDI knew the location and specifically took upon itself to consider the Washington sales tax. *Sales taxes*, however, are not the issue in the present matter, and the quotation above made no mention of the use tax or the B&O tax.

26. Other evidence supports the finding that MDI had the opportunity to provide site-specific proposals for the work in the State of Washington. With regard to a proposal for rigging work in Seattle, Mr. Daniel Rosen contemporaneously explained, "Per direction from the TSA, we do not prepare proposals until we receive a statement of work from the TSA." *ADF* Tab 98. Mr. Rosen subsequently acknowledged this process in a declaration. *MDI* Ex. O, *MDI Business Manager's Decl*. ¶ 11. In another declaration, he stated in general terms that prices for MDI's rigging work under CLIN 0009 did not include "state taxes of any sort." *MDI* Ex. A, at ¶ 19.

27. Each delivery order shown in Table 1, *supra*, had a stated ceiling, and included statements limiting the Government's liability under each order. For example, Delivery Order 18 under Contract 01900 stated:

> Funding: This Delivery Order is funded in the amount of $500,000. This amount is considered the contract ceiling. Unless modified by the Contracting Officer in writing, the Contractor may not exceed this ceiling except at its own risk. Funding in the amount of $500,000 is hereby authorized under this Delivery Order, under the provision set forth below:
>
> 3.2.4-22 Limitation of Government Liability (April 1996)
> a) In performing this contract, the Contractor is not authorized to make expenditures or incur obligations exceeding $500,000.
> b) The maximum amount for which the Government shall be liable if this contract is terminated is $500,000.
>
> (End of Clause)
>
> Expenditures above that amount are not authorized, and are at InVision's own risk.

MDI Ex. Y, Tab 18, at 29-30. These ceilings were usually the sum of the estimated amounts for the T&M CLINs plus the prices for all of the fixed-price CLINs as extended based on quantity. *See supra* Table 1 references*; but see, e.g.*, *MDI* Ex. Y, Tab 3, at 43-45 (funded ceiling less than sum of CLINs).

E. Change in Ownership

28. InVision Technologies, Inc. was the original contractor under the Contracts, but successor in interest status passed through GE Homeland Security, Inc., to the present party, Morpho Detection, Inc. *JSOUF* No. 1.

F. The Washington State Tax Assessment

29. On April 22, 2008, the State of Washington assessed MDI taxes, penalties, and interest in the amount $5,423,645.00, for the period from January 01, 2002 through March 31, 2006. *MDI* Ex. H. The assessment was under Washington State tax laws pertaining to use

tax/deferred sales tax, and business & operations ("B&O") tax. *Id.*; *see also MDI* Ex. I at 6.

30. MDI filed a "Petition for Correction of Assessment" ("Petition") with the Appeals Division of the State of Washington's Department of Revenue ("Tax Appeals Division"), on August 28, 2010. *MDI* Ex. I at 1.

31. An Administrative Law Judge ("ALJ") from the Tax Appeals Division issued a "Proposed Executive Level Determination" that denied MDI's Petition, and determined that GE Homeland owed both use taxes and B&O taxes. *MDI* Ex. R, at 10. The "Proposed Executive Level Determination" is dated October 4, 2010. *Id*. at 11.

32. On July 20, 2011, the Department of Revenue for the State of Washington issued the "Final Executive Level Determination" ("Final Determination"), which constituted the final action by the Department of Revenue, and required MDI to pay Washington State use tax and B&O tax. *MDI* Ex. CC, at 11.[5] The Final Determination did not assess sales taxes. *Id*. at 1, 5, and 10; *JSOUF No*. 49. The ALJ's Findings of Fact state that GE Homeland "manufactured and sold 46 explosive detection system (EDS) machines that were ultimately installed in Washington International [sic] airports." *MDI* Ex. CC, at 2.[6] The parties have stipulated that the assessments flowing from that Final Determination include:

Use Tax	$4,030,712	
B&O Tax	24,580	
5% Penalty	202,765	
Interest	1,020,160	
Total		$5,278,217

[5] The ODRA gave notice that it intended to designate the "Final Executive Level Determination" as an evidentiary exhibit, and provided opportunity for the parties to object. *ODRA Letter* of February 3, 2012, at page 5. Neither party objected. *Joint Submission in Response to February 3, 2012 ODRA Letter*. The ODRA designates the "Final Executive Level Determination" as MDI Ex. CC.

[6] The ODRA does not adopt the ALJ's Findings of Fact, but merely summarizes them for the purpose of explaining the basis of the ALJ's unpublished decision.

JSOUF No. 49.

G. Procedural History

33. Both contracts contain AMS Clause 3.9.1-1, "Contract Disputes," tailored to reference the TSA as the procuring-agency. That clause provides in part:

> (a) All contract disputes arising under or related to this contract shall be resolved through the Federal Aviation Administration (FAA) dispute resolution system at the Office of Dispute Resolution for Acquisition (ODRA) and shall be governed by the procedures set forth in 14 C.F.R. Parts 14 and 17, which are hereby incorporated by reference. Judicial review, where available, will be in accordance with 49 U.S.C. 4610 and shall apply only to final agency decisions. A Contractor may seek review of a final TSA decision only after its administrative remedies have been exhausted.

ADF Tab 19, § I.6; Tab 22, § I.6.

34. MDI (operating as "GE Homeland Protection, Inc." at the time) filed its Contract Dispute, styled as a "Request for Interpretation of Contract Terms and Equitable Adjustment," on December 24, 2008. *Contract Dispute* at 1.

35. During the initial status conference in this matter, MDI explained that the State of Washington's taxing authority was pursuing a tax assessment of approximately $5,000,000, and that the tax case was pending in the state's administrative process. *ODRA Status Conference Memorandum* of January 15, 2009, at 1. Counsel for MDI framed the primary issue in this Contract Dispute by clarifying:

> … that his client is not requesting that the ODRA address the issue of whether GE has any tax liability to the state of Washington. Rather, in its contract dispute, GE seeks an interpretation of whether it is entitled to reimbursement from the TSA in the event that GE is held liable for the taxes. GE further requests an equitable adjustment to the contract price to account for any such tax liability.

Id. The parties agreed that they would attempt to resolve the Contract Dispute through informal negotiation, or if needed, using alternative dispute resolution ("ADR") procedures. *Id.* at 2.

36. After the initial status conference, the parties requested and received several time extensions to enable them to focus on their efforts on negotiation. On March 27, 2009, MDI filed an Amended Contract Dispute ("Amended Contract Dispute") to address a factual error, explaining:

> [In MDI's] initial filing, we contended that one of the two contracts at issue contained the Transportation Safety Administration's ("TSA's") "after-imposed tax" clause. Upon further review, we determined that neither contract in fact includes that clause. Accordingly, and as reflected in [MDI's] amended filing, ODRA must decide whether the Christian Doctrine requires incorporation of this standard clause into both contracts, instead of just one of them. While the relevant clause is included in neither of the contracts at issue, the clause is included in the TSA contracts related to the same equipment.

MDI Letter of March 27, 2009, at 1.

37. After a further extension for negotiation, MDI requested that the matter be stayed for an extended period until the State of Washington issued a decision in a tax appeal that MDI filed. *MDI Letter* of April 24, 2009. The ODRA granted the request, and stayed proceedings until September 10, 2009. *ODRA Letter* of April 27, 2009.

38. The parties requested and received several further extensions due to the sale of the business to MDI, as well as delays in the State of Washington's tax appeal adjudication. *MDI Letters* of September 10, 2009, and July 16, 2010; *ODRA Letters* of September 22, 2009 and July 19, 2010.

39. On October 14, 2010, MDI's counsel forwarded to the ODRA a copy of the "Proposed Executive Level Determination" issued by the Appeals Division of the Washington State Department of Revenue. *MDI Letter* of October 14, 2010. MDI requested that the ODRA's stay of proceedings be lifted, and that the ODRA schedule a status conference. *Id.*

40. The ODRA convened a status conference on October 20, 2010, wherein the parties jointly requested a preliminary opportunity to brief "whether the *Christian* doctrine is applicable to the issues presented" in this Contract Dispute. *Status Conference Memorandum* of October 21, 2010. The ODRA accepted the approach and established a briefing schedule. *Id.*

41. After briefing had been completed on the *Christian* doctrine question, the ODRA directed the TSA to supplement the record with three classes of information pertaining to the TSA version of the AMS ("TSAAMS") and the formation of the Contracts in question. *ODRA Letter* of January 14, 2011. In a subsequent status conference convened at TSA's request, the TSA explained difficulties it faced as it attempted to comply with the ODRA's direction. *Status Conference Memorandum* of January 24, 2011. The ODRA permitted TSA to file declarations, if necessary, to explain why responsive documents were not available. *Id.*

42. TSA subsequently filed two separate declarations. The first, from the Director of Acquisition Policy Office of the TSA, explained that internet links to the former TSA AMS policy is no longer available, and that the TSA contracting personnel relied primarily on FAA versions of the AMS, albeit with the substitution of "TSA" for "FAA" in applicable clauses. *TSA Letter* of February 1, 2001, *Acquisition Policy Office Director's Declaration* ¶¶ 6 and 7. The second declaration was from the current Contracting Officer on the 01900 Contract, who indicated that no records were found that explain the absence of TSA AMS Clause 3.4.2-7 from the Contracts. *TSA Letter* of February 1, 2001, *Current Contracting Officer's Declaration* ¶ 6.

43. While the ODRA was considering the *Christen* doctrine question, the State of Washington's Department of Revenue issued the Final Determination. *See* FF 32.

44. The ODRA issued a *Decision on Request for Partial Summary Decision* on September 16, 2011, wherein it declined to apply the *Christian* doctrine to this case. *Contract*

Dispute of Morpho Detection, Inc., 08-TSA-039 (Decision on Request for Partial Summary Decision, September 16, 2011). Familiarity with that Decision is presumed.

45. On September 26, 2011, the ODRA established an adjudication schedule that required a substantive response and dispute file from the TSA, provided for discovery, and scheduled final submissions in accordance with the ODRA Procedural Regulation. *Status Conference Memorandum* of September 26, 2011. After several minor changes in the schedule, and after receiving final submissions, statements of the issues, joint stipulations of undisputed facts, and MDI's supplement to the Dispute File, the ODRA closed the record on January 18, 2012. *ODRA Letter* of January 18, 2012.

46. The ODRA reopened the record on February 3, 2012 after determining that several issues needed to be further developed in the evidentiary record and briefing. *ODRA Letter* of February 3, 2012.

47. The first issue that the ODRA raised pertained to Stipulation Number 33, which stated, both Contracts were "firm-fixed price, noncompetitive contracts." *JSOUF* No. 33. Noting the existence of CLIN 3000 and the fact that it contained labor rates and cost reimbursable items, the ODRA directed the parties:

> … to state the basis for JSOUF Number 33, inasmuch as it asserts that the "both Contracts were firm-fixed price" without mentioning the cost reimbursement portions of the Contracts. Address in particular the evidence in the record showing cost-reimbursement clauses, Time and Material CLINs that included cost reimbursement items, and the language found in provision L.3 of *DF* Tab 1.A. To the extent a party contends that the cost reimbursement terms of the contract are irrelevant, such party must explain the basis for the position and cite to relevant facts and law.

ODRA Letter of February 3, 2012, at 2.

48. The third issue[7] in the ODRA's Letter addressed the CLINs and delivery orders used for work in the State of Washington. Again pointing out that CLIN 3000 is a T&M CLIN

[7] The second issue, which need not be addressed in detail, pertained to whether the contracts were competitively awarded. *ODRA Letter* of February 3, 2012, at 2.

with cost reimbursement for "other direct costs," the parties, jointly or separately, were to prepare a summary exhibit consistent with Federal Rule of Evidence 1006 that sorted the work by delivery order in the first column of a table, followed by such information as CLIN citations, invoiced amounts, ceiling amounts, and current balances of unpaid funds (including subtotals "for each CLIN and cost-reimbursable expense category"). *ODRA Letter* of February 3, 2012, at 3-4. The parties were to supplement the record with supporting documents that formed the basis for the exhibit(s). The parties were also directed to address legal issues of whether the use and B&O taxes were allowable as a direct cost under the cited delivery orders, whether *Allied Painting & Decorating Co.*, ASBCA No. 43287, 93-3 BCA ¶ 26,218, *revised by* 94-1 BCA ¶ 26,406, was applicable, and whether ceilings found in the "Limitation of Government Liability clause in the various delivery and task orders . . . permits or prevents" recovery of the taxes. *Id.* at 4.

49. The parties filed timely responses, and the record closed on April 16, 2012.

III. Jurisdiction and Source of Legal Authority

The parties do not challenge the ODRA's jurisdiction over the present contract dispute, which arises out of two Contracts executed under the TSA's adoption of the FAA's Acquisition Management System ("AMS"). *Amended Contract Dispute* at 2; *TSA Substantive Response*, *passim*. From the establishment of the TSA out of the FAA in November of 2001, and until June 22, 2008, the TSA had authority to use the AMS.[8] Accordingly, the Contracts contain the AMS Clause 3.9.1-1, "Contract Disputes," tailored to reference the TSA as the procuring-agency. That clause provides in part:

> (b) All contract disputes arising under or related to this contract shall be resolved through the Federal Aviation Administration (FAA) dispute resolution system at

[8] The TSA used the FAA's Acquisition Management system under the authority of section 101(a) of the Aviation and Transportation Security Act, Pub. L. 107-71, which amended section 114(o) of title 49 of the United States Code. The Homeland Security Act of 2002, Pub. L. 107-296 (HSA), as amended, transferred TSA into DHS, but did not remove the TSA's authority to use the FAA AMS for TSA acquisitions. The Consolidated Appropriations Act of 2008, Pub. L. 110-161, at division E, Title V, section 568, strikes section 114(o) of Title 49, and became effective June 23, 2008. Accordingly, TSA has been required to follow the Federal Acquisition Regulation ("FAR") system since June 23, 2008.

> the Office of Dispute Resolution for Acquisition (ODRA) and shall be governed by the procedures set forth in 14 C.F.R. Parts 14 and 17, which are hereby incorporated by reference. Judicial review, where available, will be in accordance with 49 U.S.C. 4610 and shall apply only to final agency decisions. A Contractor may seek review of a final TSA decision only after its administrative remedies have been exhausted.

FF 33. Final TSA decisions are rendered by the TSA Administrator based on Findings and Recommendations issued by the ODRA. *TSA Delegation of Authority* dated December 23, 2003. at ¶ k.[9]

This Contract Dispute was filed prior to October 7, 2011 (FF 34), and therefore is subject to the ODRA's prior Procedural Regulation found in 14 C.F.R. pt. 17 (2011). Under that regulation, the ODRA "applies the principles of the AMS and other law or authority applicable to the findings of fact[.]" 14 C.F.R. § 17.39 (2011). The ODRA is mindful that within the TSA's former statutory authority to use the FAA's AMS, Congress granted the head of the TSA the authority to "make such modifications to the acquisition management system" he or she "considers appropriate."[10] Neither party has asserted or shown that the TSA used its former authority to issue material modifications to the FAA's AMS. FF 41 and 42. Accordingly, unless otherwise stated, the ODRA relies in these Findings and Recommendations upon the FAA AMS in effect during the relevant timeframes as the source of AMS principles.

IV. Discussion

This contract dispute poses the central question of which party, MDI or TSA, should bear the financial burden of the use tax and B&O tax imposed by the State of Washington relating to two contracts between the parties. MDI claims that it never had the opportunity to include such taxes in its prices because the installation locations were not specified in the initial solicitation, and further, that it expected another contractor to perform the actual installation work. *MDI Amended Contract Dispute* at 3-4 and 8-9. To recover its administratively adjudicated tax

[9] The TSA Delegation of Authority dated December 23, 2003 is available on the ODRA website at http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/delegations/ .

[10] Aviation and Transportation Security Act, Pub. L. No. 107–71, § 101(a), 115 Stat. 597, 601 (amending Chapter 1 of title 49, United States Code, by adding § 114(o)).

obligation of $5.2 million to the State of Washington, MDI claims that the contracts should have contained AMS Clause 3.4.2-7, "Federal, State, and Local Taxes – Fixed-Price Noncompetitive Contract (April 1996)," which MDI argues would place the financial burden of the tax assessment on the TSA as an increase in the contract price. *MDI Amended Contract Dispute* at 6-12. A price increase is justified, according to MDI, because the specific tax assessments stem from the Department of Revenue's unprecedented interpretation of Washington tax laws, which constitutes an "after-imposed tax" properly allocated to the TSA under the clause. *Id*. at 7.

The TSA, however, asserts that the contracts properly omitted the same clause, and therefore MDI retains the burden to pay the state's tax assessment. In the alternative, TSA argues that even if the clause should be in the Contracts, its terms do not obligate the TSA to increase the prices under the Contracts to compensate MDI. *TSA Final Submission* at 3.

Both parties' arguments ignore the hybrid nature the Contracts.[11] *See* FF 13 and 14. The Contracts logically had firm-fixed-price CLINs for the sale and delivery EDS units in California (FF 7, 15, and 17), but site-specific installation and integration work was ordered under subsequent task and delivery orders using both fixed-price CLIN 0009 and T&M CLIN 3000. FF 23 – 26. The State of Washington has not taxed the sale of the EDS equipment to Government, but rather has assessed a use tax and B&O tax relating to MDI's onsite services in the State of Washington. FF 23 and 32. Recovery of tax expenses under these two CLINs requires separate analyses. Specifically, MDI's argument under AMS Clause 3.4.2-7 pertains only to firm-fixed-price CLINs, while the cost-reimbursement aspect of CLIN 3000 poses

[11] The Contracts are neither strictly firm-fixed-price contracts, nor strictly T&M contracts; rather, Findings of Fact 13 and 14 show they are hybrids of the two contract types. In reaching this conclusion, the ODRA rejects Joint Stipulation Number 33 as unsupported by substantial evidence to the extent it asserts that the Contracts are solely firm-fixed-price contracts. Stipulations are not absolutely binding on forums, which have broad discretion in determining whether to hold a party to a stipulation. *See, e.g., Blohm v. Comm'r*, 994 F.2d 1542, 1553 (11th Cir. 1993). Stipulations may be set aside "if accepting them would be manifestly unjust or if evidence contrary to the stipulation was substantial." *Loftin and Woodward, Inc. v. United States*, 577 F.2d 1206, 1232 (5th Cir. 1978). *See also United States v. Ret. Servs. Grp.*, 302 F.3d 425, 430 (5th Cir. 2002); *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1098 (10th Cir. 1991); *TI Fed. Credit Union v. DelBonis*, 72 F.3d 921, 928 (1st Cir. 1995); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989). In the present matter, the ODRA provided notice that it questioned the stipulation. FF 47. The parties acknowledge the T&M CLIN, but nevertheless assert that because most of the contract values relates to the firm-fixed-price CLINs, the contracts therefore are firm-fixed-price. *Joint Submission in Response to February 3, 2012 ODRA Letter* at 2. This is contrary to the CLIN structure, the delivery orders, and the express statement found in *ADF* Tabs 19 and 22 at § B.2.

questions of allowability of *costs* within ceiling limitations, rather adjustments to *price*. As discussed below, the ODRA finds that neither analysis provides relief to MDI, and recommends that the Amended Contract Dispute be denied.

A. The Fixed-Price CLIN Analyses: Regardless of Incorporation of AMS Clause 3.4.2-7, the Taxes are not "After-Imposed"

Regardless of whether the ODRA deems AMS Clause 3.4.2-7 to be incorporated into the Contracts under the *Christian* doctrine or by other means, the ultimate question in this Contract Dispute is whether the clause creates an avenue of relief for MDI. As explained below, it does not, and the ODRA therefore recommends that the Contract Dispute be denied.

1. The ODRA Need not Decide whether AMS Clause 3.4.2-7 is Incorporated into the Contracts

As a prerequisite to its theory of recovery, MDI asserts that AMS Clause 3.4.2-7, "Federal, State, and Local Taxes – Fixed-Price Noncompetitive Contract (April 1996)" should be incorporated into the Contracts as a matter of law under the *Christian* doctrine. *Amended Contract Dispute* at 6-7. The ODRA declined to adopt the *Christian* doctrine previously in this case. *See Decision on Request for Partial Summary Decision* at 17. In that Decision, the ODRA recognized the imperfections of the *Christian* doctrine, and observed that other avenues potentially are available for incorporation of omitted terms. *Id*. at 15-16. In these Findings and Recommendations, as discussed below, the ODRA concludes that regardless of whether the clause is incorporated into the Contracts, MDI is not entitled to the relief requested because the taxes in question are not "after-imposed taxes" within the meaning of the clause.[12]

2. MDI's General Obligation to Include Taxes in its Proposals

AMS Clause 3.4.2-7 generally obligated MDI to include applicable state taxes in the fixed-price proposals that MDI provided for the task and delivery orders involving site work in Washington State. Specifically, the relevant portion of the clause states this general rule:

[12] Given that the *Christian* doctrine is not determinative in this Contract Dispute, the ODRA declines to decide on these facts the general applicability of the *Christian* doctrine to the AMS.

> (b) Unless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

FF 1 (quoting the full clause). Identical language considered in similar contexts has established a general rule that "unambiguously required the contractor to pay state and local sales and use taxes." *Appeal of AG Engineering, Inc.*, ASBCA No. 53370, 2004-1 BCA ¶ 32,482, at 160,672, (citing *Hunt Constr. Group., Inc. v. United States*, 281 F.3d 1369 (Fed. Cir. 2002)). Allocation to the contractor of the duty to investigate and include local and state taxes is appropriate because the contractor is in a better position to determine the projected taxation of its own business operations. *See e.g., Tumpane Service Corp.,* B-220465, Jan. 28, 1986, 86-1 CPD ¶ 95.

MDI repeatedly points to the contract formation process to justify its failure to include Washington taxes in its prices. MDI asserts that it could not have included sums for Washington State taxes because the installation locations were not specified in the initial solicitation, and further, that it expected another contractor to perform the actual installation work. *Amended Contract Dispute* at 3-4 and 8-9. This argument, however, does not account for the contractual procedures that provided MDI with ample and repeated opportunities to account for use taxes and B&O taxes in the proposals MDI submitted for delivery orders after execution of both contracts. The record conclusively demonstrates that the delivery orders for installation, testing, and integration work in Washington during the audit period were based on MDI's site-specific proposals, which MDI prepared under the procedures found clause H.2., and which were expressly cited in many delivery orders by their InVision proposal number.[13] FF 11, 19, 24-26.

Having failed to include taxes in the proposals for the delivery orders with firm-fixed-price CLIN 0009, MDI attempts to avoid its general responsibility to include state taxes in its proposals by relying on an exception in AMS Clause 3.4.2-7 that could relieve it of "after-imposed taxes."

[13] MDI also was a party with all of the relevant facts in its possession. Knowing that it did not include a sales tax in its prices for the actual EDS units sold in California, MDI also knew or should have known that it could not have asserted a credit against Washington State's *use* tax for items taxed under another state's *sales* tax. *See* Wash. Rev. Code § 82.12.035 (2001 through 2006).

3. The Use and B&O Taxes are not "After-Imposed" Taxes

The general rule requiring the inclusion of taxes in fixed-prices has two exceptions that permit fixed-prices to be increased. FF 1 at ¶ (c). MDI relies only on the first exception, which allows for a price increase for "after-imposed taxes."[14] The clause provides the following definitions of after-imposed taxes:

> (3) "After-imposed tax," as used in this clause, means any new or increased Federal, State, or local tax or duty, or tax that was excluded on the contract date but whose exclusion was later revoked or amount of exemption reduced during the contract period, other than an excepted tax, on the transactions or property covered by this contract that the Contractor is required to pay or bear as the result of legislative, judicial, or administrative action taking effect after the contract date.

FF 1. MDI considers the decision it received from the State of Washington Department Revenue to be an "unprecedented interpretation of Washington State tax laws." *MDI Final Submission* at 12. By extension, MDI believes "this novel interpretation and application of law constitutes an imposition of a 'new' State tax that MDI 'is required to pay or bear as a result of legislative, judicial, or administrative action taking effect after the contract date." *Id*. (citing *AMS Clause* 3.4.2-7(a)(3)'s definition (quoted above)). Although MDI acknowledges that "these taxes have existed for some time," i.e., since 1975, it asserts that State of Washington has never assessed these taxes against contractors in a similar posture. *MDI Final Submission* at 12-13. This position restates arguments rejected by the Washington State ALJ in the administrative appeal.

The administrative appeal, in the form of a "petition," resulted in the issuance of a "Final Executive Level Determination" that upheld most of the use tax and B&O tax assessed by the State of Washington for its audit period of January 1, 2002 to March 31, 2006. FF 29 and 32.

[14] *See Amended Contract Dispute* at Section IV.B.; *MDI Final Submission* at Sections IV and V. The second exception allows for an increase only if three conditions are met, i.e., 1) a term or condition of the contract specifically excluded a tax from the contract price; 2) the contractor has provided a written statement the priced does not include a contingency for such a tax; and, 3) the contractor's added tax liability is not due to its own fault negligence, or failure to follow instructions. FF 1 at ¶ (c). MDI has not directed the ODRA's attention to a specific term or condition of the contract that requires B&O or use taxes to be excluded from prices, nor has the ODRA found such language in the Contracts. Further, the record contains only a few of MDI's proposals on the delivery orders, and none of them affirmatively represent in writing that B&O and use taxes are excluded. *See e.g., ADF* Tabs 101 (North Carolina) and 106 (Washington State).

At all times during the audit period at issue, the State of Washington levied on "consumers" a use tax that in the pertinent part of the statute states:

> (1) There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a ***consumer***:
>
> (a) Any article of tangible personal property purchased at retail, or acquired by lease, gift, repossession, or bailment, or extracted or produced or manufactured by the person so using the same, or otherwise furnished to a person engaged in any business taxable under RCW 82.04.280 (2) or (7); …

Wash. Rev. Code § 82.12.020 (2001 through 2006)[15] (emphasis added). The B&O tax also applies to "consumers." Wash. Rev. Code § 82.04.280 (2001 through 2006). MDI argued that it was not subject to these taxes because it was not a "consumer" within the following statutory definition:

> "Consumer" means the following:
>
> (6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon, or above real property ***of or for the United States***, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation; also, any person engaged in the business of clearing land and moving earth of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW. Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person . . .

Wash. Rev. Code § 82.04.190 (2001 through 2006) (emphasis added). MDI argued before the Washington State ALJ that it is not a "consumer" because "all work was performed at Seattle-Tacoma Airport and Spokane Airport, real property that is of and for the state of Washington," rather than the United States. *MDI Final Submission* at 13. The ALJ rejected this argument, explaining in reference to the definition of "consumer":

[15] The ALJ did not include the year of the code sections that he cited. The ODRA has compared the yearly versions of the Revised Code of Washington from 2001 to 2006, which covers the audit period in question. It finds no material differences in the relevant text relied upon by the ALJ.

> The Department concludes that RCW 82.04.190(6) does not mandate that the real property at issue be of the United States. Rather, for purposes of RCW 82.04.190(6), business conducted can be *for* the United States on real property *not* of the United States, and those conducting such business can still be a "consumer." Since Taxpayer [MDI] assembled EDS machines in Washington on behalf of TSA, an instrumentality of the United States, on real property owned by the Port of Seattle, the Department concludes that Taxpayer's argument on this point is erroneous.

MDI Ex. CC, at 6 n.6 (italics in the original). Based on this statement buried in a footnote of the Determination, MDI now charges that the ALJ has created a "prototypical after-imposed tax." *MDI Final Submission* at 12.

MDI's position is not supported by the canons of statutory interpretation or by demonstrating that contrary interpretations prevailed prior to the ALJ's Determination. The ALJ's footnote shows that he relied on the plain, simple, and singular interpretation that gives meaning to the complete language of the statutory definition of "consumer." "Under accepted canons of statutory interpretation, [a forum] must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *accord, Davis v. State ex rel. Department of Licensing*, 137 Wash. 2d 957, 963, 977 P.2d 554, 556 (1999). The ALJ gave meaning to the phrase "or for" while MDI would read it out of the statute entirely.[16]

The ODRA also considers that MDI does not cite to prior, contrary interpretations of the statute, whether in case law, official tax guides, or even the press. The ODRA independently has not found any contrary legal interpretation, despite the long history of applying the use tax to federal contractors within the State of Washington.[17] MDI argues that the ALJ created a new, after-

[16] It is not the ODRA's role to review the ALJ's determination regarding state law. The ODRA, however, notes that MDI makes its current argument by changing the conjunction "or" in the statute to "and" in its argument. *Compare* Wash. Rev. Code § 82.04.190 (2001 through 2006) ("of or for") *with MDI Final Submission* at 13 ("of and for").

[17] The tax on Federal Government contractors' use of government property has a long and very public history in the State of Washington. Most notable is the Supreme Court of Washington's decision in *Boeing Co. v. State*, wherein the Court upheld the use tax under an earlier version of RCW 82.12.020 that involved Boeing's use of Federal Government property on several federal contracts. *Boeing Co. v. State*, 74 Wash. 2d 82, 442 P.2d 970 (en banc) (1968).

imposed tax since the footnote is without precedent and might have been a matter of first impression. *MDI Final Submission* at 13 (citing *JSOUF* ¶ 51). The ODRA rejects this contention. The plain language of the long standing statutory definition of "consumer" spoke for itself for more than three decades.[18]

The ODRA, therefore, does not accept MDI's contention that the State of Washington's Determination created a new, after-imposed tax within the meaning of the AMS Clause 3.4.2-7, "Federal, State, and Local Taxes – Fixed-Price Noncompetitive Contract (April 1996)." It follows that even if the ODRA were to accept MDI's argument that the clause should be incorporated into the Contracts, MDI was bound by the general rule that its fixed-prices included "all applicable Federal, State, and local taxes and duties." *See AG Engineering, Inc*., ASBCA 53370, 04-1 BCA ¶ 32,482 at 160,672.

B. Time and Materials CLIN 3000

The analysis under AMS Clause 3.4.2-7, "Federal, State, and Local Taxes – Fixed-Price Noncompetitive Contract (April 1996)" has no bearing on whether MDI can recover its tax expenses for work associated with CLIN 3000 in the State of Washington. The clause applies to fixed-prices, not time and materials pricing under CLIN 3000. *Cf. Appeal of General Dynamics C4 Systems, Inc*., ASBCA No. 54988, 08-1 BCA ¶ 33,779, at 167,185 (fixed-price Changes clause do not apply to T&M CLINS). Where tax expenses were incurred under the cost reimbursement terms of the CLIN 3000 as an "other direct cost" (*see* FF 8 and 16), the proper analysis must be based on whether the taxes are allowable as a direct cost under the applicable cost principles. *See Allied Painting & Decorating Co*., ASBCA No. 43287, 93-3 BCA ¶ 26,218 at 130,483 (recovery of taxes barred for fixed-price CLIN, but remanded to the parties to

[18] The relevant language in RCW 82.04.190(6) (2000) was added in 1975. *See* historic notes found in Wash. Rev. Code Ann. § 82.04.190 (West 1989) (citing Laws 1975, 1st Ex.Sess., ch. 90, § 2, eff. July 1, 1975). MDI provided a declaration from the attorney it engaged to represent MDI before the State of Washington Department Revenue. *MDI* Ex. V at ¶ 5. The attorney executed his declaration with the caveat that MDI did not waive the attorney-client privilege. *Id*. at ¶ 2. After reiterating the positions of the parties before the ALJ, the attorney indicated that "[n]o Washington court has addressed" the questions he raised regarding the definition of "consumer," making them "issues of first impressions." *Id*. at ¶ 10. Even assuming that his research is reliable and addresses a factual rather than a legal question, the ODRA finds that it does not outweigh the fact that the plainly stated statutory definition of "consumer" has been in place since 1975. *See supra* text accompanying notes 14 and 15.

determine quantum under a cost-reimbursement CLIN), *revised by* 94-1 BCA ¶ 26,406. Washington State's use and B&O taxes generally are allowable,[19] but necessarily are subject to strictly construed cost limitations found in each order just like any other reimbursable costs. *See e.g., Ray Cummuns., Inc. v. Dep't of State*, GSBCA No. 15509-ST, 2006-1 BCA ¶ 33,273, 2006 GSBCA LEXIS 76 at 64.

MDI, as shown by its *Contract Dispute* through to its *Final Submission*, has never relied on CLIN 3000 as a theory of recovery in this Contract Dispute. Even after the ODRA advised the parties of the issue, MDI attempted to minimize consideration of CLIN 3000. Specifically, by letter and subsequent conference call, *the ODRA noted the cost reimbursement nature of CLIN 3000*, and directed the parties to provide information on CLINs used for work performed in the State of Washington. FFs 46 and 48. The parties were directed to prepare, jointly or separately, an exhibit(s) that sorted the work by delivery order in the first column of a table, followed by such information as CLIN citations, invoiced amounts, ceiling amounts, and current balances of unpaid funds (including subtotals "for each CLIN and cost-reimbursable expense category"). FF 48. The parties were also directed to address legal issues of whether the use and B&O taxes were allowable as a direct cost under the cited delivery orders, whether *Allied Painting & Decorating Co*. was applicable, and whether ceilings found in the "Limitation of Government Liability clause in the various delivery and task orders . . . permits or prevents recovery" of the taxes. *Id*. MDI declined the opportunity to advance an argument that use and B&O taxes are recoverable as a reimbursable expense under CLIN 3000. While MDI argues that the costs are allowable, it does not assert that the ODRA should embrace the *Allied Painting* approach of providing alternative relief under the cost reimbursement aspects of the contract. *See Joint*

[19] The AMS Cost Principles in effect at the time of these contracts generally consider state and local taxes to be allowable costs. *AMS Procurement Guidance T3.3.2.A.2.e.38* (November 2002 (rev. 3)) ("*AMS Cost Principle* 38")."Taxes on property used solely in connection with either non-Government or Government work should be considered directly applicable to the respective category of work unless the amounts involved are insignificant or comparable results would otherwise be obtained[.]" *Id.*, at 38.c. Thus, under AMS Cost Principle 38, state taxes – including use and B&O taxes – may be charged as direct costs to a contract if incurred directly for that contract and are otherwise allowable. See http://fast.faa.gov/archive/v0103/procurement_guide/html/3-3-2.htm, which contains the November 2002 (rev. 3) version of the AMS Cost Principles. It is noted that a revision to AMS Cost Principle 32 appears to have inadvertently restarted the number sequencing of the Cost Principles, and Principle 38, "Taxes," appears as number "6." The ODRA will cite to "AMS Cost Principle 38" rather than to the erroneous designation.

Submission in Response to February 3, 2012 ODRA Letter at 11. Further, MDI deemed the Limitation of Liability clauses found in the delivery orders to be "irrelevant to the analysis." *Id.*

The ODRA's review is not constricted solely to the legal theories advanced by the MDI,[20] and it has given both parties ample opportunity to address whether the cost reimbursement aspect of CLIN 3000 affords a basis for relief to MDI. Logic and a proper understanding of the contracts mandate such an analysis. The ODRA finds that the record does not support such relief. MDI Ex. Z, which contains an incomplete sample of invoices, provides an insufficient basis on which to determine the available funds remaining in the relevant orders because other invoices may exist that reduce the available balances. Additionally, despite MDI's contractual obligation to maintain task order accounting under clause G.10 of both Contracts (FFs 9 and 20), the parties themselves report that the current uncharged balances on nearly all of the orders are "unknown." *See Joint Submission in Response to February 3, 2012 ODRA Letter* at attached tables.[21] MDI "may not recover simply by pleading ignorance" of facts contractually required to be in its possession. *Lisbon Contractors, Inc., v. United States*, 828 F.2d 759, 768 (Fed. Cir. 1987). The ODRA, therefore, finds that MDI has failed to proffer substantial evidence supporting recovery under CLIN 3000.

V. Conclusion

The record shows that MDI had full knowledge that its services would be performed in the State of Washington when it submitted its many delivery order quotations to the Government. MDI nevertheless neglected to include use and B&O taxes in its quotations for these orders. As to firm-fixed-price CLINs found in the Contracts, the contractor, not the Government, bears the obligation when submitting quotations to understand and include all local and state taxes. *See supra* Part IV. A. 2. Further, AMS Clause 3.4.2-7 "Federal, State, and Local Taxes--Fixed-Price,

[20] *Long Island Savings Bank, FSB v. U.S.*, 503 F.3d 1234, 1245 (Fed. Cir. 2007), citing *Kamen v. Kemper Fin. Servs., Inc*., 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991*); Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed.Cir.1990).

[21] The limitations stated in most of the large orders included firm-fixed-priced goods and rigging services (CLIN 0009). Delivery of these goods and the rigging services would count against the ceiling, as would the actual labor provided under CLIN 3000. The aggregate of CLIN 3000 obligations under all of the relevant orders ($3,112,060) is less than the overall tax assessment ($4,055,292 (excluding interest and penalties)). *Compare* FF 24 *with* FF 32.

Noncompetitive Contract (April 1996)," even if viewed as part of the Contracts, provides no basis to increase the fixed-prices because the taxes in question are not "after imposed taxes" within the meaning of the clause. The record also does not support recovery of the taxes as a reimbursable direct expense under CLIN 3000. For all of the reasons stated herein, the ODRA recommends that the Administrator of the Transportation Security Administration deny MDI's Contract Dispute in its entirety.

_____*/S/*_____
John A. Dietrich
Dispute Resolution Officer and Administrative Judge
Office of Dispute Resolution for Acquisition

APPROVED:

_____*/S/*_____
Anthony N. Palladino
Director and Administrative Judge
Office of Dispute Resolution for Acquisition

June 8, 2012